SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

GINARTE GALLARDO GONZALEZ & WINOGRAD, LLP,

Plaintiff,

-against-

WILLIAM SCHWITZER, WILLIAM SCHWITZER & ASSOCIATES, P.C., GIOVANNI C. MERLINO, BARRY AARON SEMEL-WEINSTEIN, BETH MICHELLE DIAMOND, RENE G. GARCIA, THE GARCIA LAW FIRM, P.C., MIGNOLIA PENA, AND JANILDA GOMEZ,

Defendants.

Index No. 159991/2018

Oral Argument Requested

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION BY DEFENDANTS RENE G. GARCIA AND THE GARCIA LAW FIRM TO DISMISS THE COMPLAINT

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Defendants Rene G. Garcia and The Garcia Law Firm (collectively, the "Garcia Defendants"), by their undersigned counsel, respectfully submit this Reply Memorandum of Law in further support of their motion to dismiss the Complaint filed by Plaintiff Ginarte Gallardo Gonzalez & Winograd, LLP ("Ginarte") pursuant to CPLR 3211(a)(7).

PRELIMINARY STATEMENT

In light of the numerous and substantial deficiencies in its Complaint, Ginarte now submits additional "evidence" to try to resuscitate its claims. But none of this purported evidence remedies the fatal flaws in Ginarte's claims against the Garcia Defendants. Indeed, virtually none of Ginarte's submission relates to the Garcia Defendants at all. The bottom line thus remains the same: Ginarte's Complaint, which alleges that the Garcia Defendants are part of a supposed conspiracy to "steal" its clients, fails to state any cause of action against the Garcia Defendants because, in addition to having no basis in law, it does not to allege any specifics about conduct—much less misconduct—undertaken by the Garcia Defendants.

Ginarte's opposition makes clear that its sole theory of liability as to the Garcia Defendants is that because they share office space with the Schwitzer Defendants and because they were substituted as counsel for Ginarte in a few cases, they must have participated in a "scheme" to steal Ginarte's cases and violate the law. But nothing in Ginarte's opposition papers connects the Garcia Defendants to the alleged scheme: although Ginarte submits five affidavits from purported clients (improperly redacting the names of the affiants without this Court's permission), not one of those clients claims to have met the Garcia Defendants or to have heard any reference made to the Garcia Defendants—indeed, not one mentions the Garcia Defendants at all. *See* Robert Aff. Exs. 4, 9, 14, 16, 18 (Dkt. Nos. 90, 95, 100, 102, 104). The two affidavits of Ginarte employees are likewise bereft of any reference to the Garcia Defendants, as is the "written statement" of a Schwitzer Firm

"former employee." *Id.* Exs. 11, 13, 20 (Dkt. Nos. 97, 99, 106). And although Ginarte subpoenaed the telephone records of the two "runners," Mignolia Pena and Janilda Gomez, who allegedly solicited clients from the office of Dr. Jose Colon, there is no evidence of any calls between Pena or Gomez and the Garcia Defendants. *Id.* Ex. 8 (Dkt. No. 94). Indeed, Ginarte does not allege that the Garcia Defendants met, knew, communicated with, or otherwise had any contact with either of the alleged "runners" at all. The only documents in Ginarte's voluminous submission that even mention the Garcia Defendants are three letters from former Ginarte clients (whose names are inexplicably and improperly redacted) substituting the Garcia Firm as counsel. *Id*. Ex. 2 (Dkt. No. 88). But Ginarte fails to provide any evidence—or even make any allegation—establishing that those substitutions resulted from any wrongful conduct by the Garcia Defendants.

Ginarte's opposition thus confirms that its claims against the Garcia Defendants are based entirely on three alleged facts: (1) the Garcia Defendants share office space with the Schwitzer Defendants; (2) three of Ginarte's former clients—whose identities Ginarte has inexplicably and improperly hidden—chose to substitute the Garcia Defendants as counsel; and (3) those three clients at some point visited the same doctor as other Ginarte clients. This is simply insufficient to state a claim of any kind. *See Fleischer v. NYP Holdings, Inc.*, 104 A.D.3d 536, 538 (1st Dep't 2013) (holding that "conclusory" and "speculative" allegations fail to state claim for conspiracy liability); *Srob v. Raymount Realty*, Inc., 34 A.D.2d 1002, 1003 (2d Dep't 1970) ("[]he complaints do not specifically allege, nor are there facts alleged from which it can be reasonably inferred, that appellant actively participated in the claimed wrongdoing").

The arguments set forth in the Reply Memorandum of Law by Defendants Schwitzer, William Schwitzer & Associates, P.C., Giovianni Merlino, Barry Semel-Weinstein, and Beth Diamond (the "Schwitzer Reply") (Dkt. No. 135) apply equally to the Garcia Defendants, and the

Garcia Defendants adopt and incorporate by reference all of the facts and arguments set forth in the Schwitzer Reply as if fully set forth herein. For the reasons set forth therein and below, Ginarte has failed to state any cause of action against the Garcia Defendants, and this motion to dismiss should be granted.

FACTUAL BACKGROUND

The allegations of the Complaint and the additional facts Ginarte added in its opposition in an attempt to remedy the deficiencies in its Complaint are outlined in the Schwitzer Reply, which is adopted and incorporated by reference herein.

As set forth in the Garcia Defendants' Memorandum of Law in Support of Their Motion to Dismiss ("Garcia Memorandum of Law") (Dkt. No. 32), Ginarte's Complaint includes virtually no factual allegations directed specifically at the Garcia Defendants. *See* Garcia Memorandum of Law at 2-3. Indeed, Ginarte's only factual allegations in the Complaint specific to the Garcia Defendants are as follows:

- Rene Garcia is an attorney licensed to practice law in the State of New York. *See* Cplt. ¶ 11. He is the principal of the Garcia Law Firm and a solo practitioner. *Id.*
- In June 2018, one of Ginarte's (unidentified) clients elected to substitute the Garcia Law Firm for Ginarte as counsel in an (unidentified) action. *Id.* ¶ 31. The substitution form listed the Garcia Law Firm as having the same address as the Schwitzer Law Firm. *Id*.
- After that, other of Ginarte's (also unidentified) clients elected to substitute the Garcia Law Firm for Ginarte as counsel in other (again unidentified) cases in 2018. *Id*. ¶¶ 32-33. The substitution forms for those cases also listed the Garcia Law Firm as having the same address as the Schwitzer law Firm. *Id*.
- The former Ginarte clients who chose to substitute the Garcia Firm as counsel were treated by a doctor, whom Ginarte identified as "Dr. X" in the Complaint (Cplt. ¶ 34).[1]

[1] Ginarte now identifies "Dr. X" as a Doctor Colon. *See* Opp. (Dkt. No. 85) at 7. Ginarte offered no basis for hiding Doctor Colon's identity in the Complaint, and the fact that it has revealed the Doctor's identity now suggests that it did so—as it has done with the redaction of case information and names from the substitution letters—not for any permissible or legitimate reason, but to enable it to make its outlandish claims while at the same time hindering Defendants'

In its opposition, Ginarte adds only the following additional information specific to the Garcia Law Firm:

- A total of three of Ginarte's clients substituted the Garcia Law Firm as counsel in all of 2018.[2] *See* Robert Affirmation Ex. 2 (Dkt. No. 88).

ARGUMENT

A. Ginarte's Wholly Conclusory Allegations Fail To State A Cause Of Action Against The Garcia Defendants

As set forth in the Garcia Memorandum of Law (Dkt. No. 32, at 3-4), none of the limited factual allegations in the Complaint specific to the Garcia Defendants allege a tortious act of any kind. Rather, the allegations apply either to other named defendants (*e.g.*, Cplt. ¶¶ 35, 37, 39-40) or purport to apply to all of the "Defendants" in a general and a wholly conclusory fashion that is insufficient to state a claim against the Garcia Defendants (*e.g.*, Cplt. ¶¶ 35, 37-38, 41-42).

Recognizing the utter lack of allegations specific to the Garcia Defendants in its Complaint, Ginarte asserts that it can establish a "nexus between the Garcia Defendants and the Schwitzer Defendants beyond their shared office space." Ginarte Opp. (Dkt. No. 85) at 2. But, at best, the only factual "nexus" Ginarte has alleged between the Garcia Defendants and the supposed client-stealing scheme remains that (1) the two law-firm Defendants share office space, (2) in 2018, three Ginarte clients chose to replace Ginarte with the Garcia Firm, and (3) those three clients at some point went to the same doctor as other Ginarte clients, who had no connection to the Garcia

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ability to investigate and defend against those claims. In any event, Ginarte's voluminous submissions concerning the supposed activities of the two "runners," Pena and Gomez, who purportedly frequented Doctor Colon's offices, fail to show any connection between those runners and the Garcia Defendants.

[2] Plaintiff has, without explanation or permission by this Court, redacted the names of its alleged former clients, as well as the case numbers and names of the cases in which the substitutions took place.

Defendants but who were allegedly approached by a "case runner," Pena, who also had no connection to the Garcia Defendants, never took potential clients to see the Garcia Defendants, and, indeed, never mentioned the Garcia Defendants at all.

The only "facts" Ginarte submits in its opposition that relate to the Garcia Defendants are three substitution of counsel notices, from three different months in 2018, for three unidentified clients in three unidentified cases. Ginarte has, incredibly, redacted the client names, case names, and index numbers from the documents. Ginarte offers no justification for these redactions, and there is none.[3] As such, the Court must disregard this purported evidence. *See Collitti v. Deutsch*, 150 A.D.3d 1196, 1198 (2d Dep't 2017) (holding that court should disregard a redacted affidavit where the plaintiff does not offer an explanation for redacting the affiant's name); *537 Greenwich LLC v. Chista, Inc.*, 19 Misc. 3d 1133(A) (Table), 2008 WL 2079470 (Civ. Ct. N.Y. Cty. May 14, 2008) (holding that the documents submitted by petitioner, purportedly reflecting purchase offers for its building by third parties, "may not be considered herein as they are not in admissible form due to the petitioner's unilateral redaction of the offeror's identities").

But even if the Court credits this additional "evidence," it does not change the fact that Ginarte has failed to allege a single tortious act by the Garcia Defendants. Indeed, Ginarte's submission lacks numerous facts that are fundamental to its claims against the Garcia Defendants. For example:

- Ginarte does not allege that the Garcia Defendants made a single disparaging remark about Ginarte;

[3] Plaintiff claims that it redacted the names of the clients in the affidavits it submitted "to protect the affected clients." *See* Ginarte Opp. at 10 n. 3. These redactions are also wholly inappropriate and should likewise be disregarded. But Plaintiff does not even try to assert any basis for redacting the case numbers and names of the clients who filed notices of substitution. Rather, Plaintiff's only possible reason for redacting the case information—without this Court's permission—is once again to make it difficult for the Garcia Defendants to investigate and defend against Plaintiff's claims. The Court should not countenance such gamesmanship.

- Ginarte does not allege that the purported "runners," Pena and Gomez, ever even mentioned the Garcia Defendants at any time, much less claimed to act on behalf of or in conjunction with the Garcia Defendants;

- Ginarte does not allege that the purported runners ever met with or called the Garcia Defendants, and, indeed Ginarte does not claim that the runners' phone records show any contact between the "runners" and the Garcia Defendants;

- Ginarte does not allege that the purported runners arranged any meetings between any Ginarte client and the Garcia Defendants, or any connection between the purported runners and the Garcia Defendants at all;

- Ginarte does not allege that the Garcia Defendants offered any financial inducement to any Ginarte client, or that anyone else offered any financial inducement on behalf of the Garcia Defendants.

This silence speaks volumes. The essence of Ginarte's Complaint is that the Defendants were members of a conspiracy pursuant to which the alleged runners met with Ginarte's clients at Dr. Colon's office and offered them various financial inducements to substitute "Defendants" as counsel, making denigrating statements about Ginarte in the process. *See* Cplt. ¶¶ 35-41. But none of those allegations, and none of the purported witness statements or other purported evidence offered in support of those allegations (Dkt. Nos. 90, 95, 97, 100, 102, 104) establish, or even imply, any connection between the Garcia Defendants and either the alleged runners, the alleged denigrating statements, or the supposed financial inducements that form the foundation of the alleged scheme. Because Ginarte alleges no specific wrongful conduct by the Garcia Defendants, its claims against them rely solely on their alleged participation in the claimed conspiracy.

The law is clear, however, that "although tort liability may be imposed based on allegations of conspiracy which connect nonactors, who might otherwise escape liability, with the [tortious] acts of their coconspirators" a plaintiff must make "more than a conclusory allegation of conspiracy or common purpose ... to state a cause of action against such nonactor." *Schwartz v. Society of New York Hosp.*, 199 A.D.2d 129, 130 (1st Dep't 1993) (internal quotation marks and citations omitted). The court in *Schwartz* thus found that "the bare allegation" that two defendants

were acting in concert with another defendant, "without any allegation of independent culpable behavior" by the two defendants, was "clearly insufficient" to link them to the allegedly wrongful conduct. *Id.* Here, as in *Schwartz*, Ginarte has made only a "bare allegation" that the Garcia Defendants was acting in concert with the other defendants. Because it has failed to allege any "independent culpable behavior" by the Garcia Defendants, its attempt to hold them liable based solely on their purported participation in the alleged conspiracy must be rejected. *See also Fleischer*, 104 A.D.3d at 538 (1st Dep't 2013) ("Plaintiff's allegations that all defendants, including the Johnson defendants, engaged in a conspiracy to defame her are speculative and insufficient to sustain such claim…. Plaintiff does not allege that the Johnson defendants made defamatory comments about her, nor does she allege that the Johnson Defendants instructed NYP, Gawker and/or Gothamist to make or publish defamatory comments about her.").

Ginarte argues that the Garcia Defendants' "correspondence with Ginarte, the common address of the two [defendant law] firms, the letters" showing that the two defendant law firms share an address, "the timing of the letters," and the "common threads," *i.e.*, Dr. Colon, are "sufficient to raise an inference favorable to the Plaintiff" that the Garcia Defendants were involved in the alleged scheme. *See* Ginarte Opp. at 33. But this list of factors boils down to the same three allegations described above: that (1) the two defendant law firms share office space; (2) three clients substituted the Garcia firm as their counsel;[4] and (3) the clients were patients of Dr. Colon.

[4] Plaintiff suggests that the "timing" of the substitution letters is significant. *See* Ginarte Opp. at 33, 37. But the three Garcia Firm substitutions were in entirely different months (June, September, and early October 2018), and at different times from the sole Schwitzer Firm substitution (later in October 2018) and from the dates described in the client affidavits (August and late October 2018). This fails to establish any connection at all, much less coordinated action.

Ginarte fails to cite any authority that would support sustaining the allegations against the Garcia Defendants based on such tenuous allegations. It relies on *Nonnon v. City of N.Y.*, 9 N.Y.3d 825 (2007) for the proposition that its submissions "are sufficient to raise an inference favorable to the Plaintiff … that the Garcia Defendants acted in concert with the Schwitzer Defendants." (Dkt. No. 85, at 33). But the Court in *Nonnon* addressed only whether the facts set forth in the plaintiff's supplemental affidavit remedied the deficiencies in the plaintiff's allegations regarding proximate cause for its injuries, 9 N.Y.3d at 827, not whether conclusory allegations such as Ginarte's were sufficient to support a conspiracy claim. Ginarte's supplemental submissions here serve only to add one additional fact with respect to the Garcia Defendants: that the "several" substitutions it alleged in its Complaint amounted to three substitutions of the Garcia Defendants in all of 2018. The client affidavits and other purported evidence on which Ginarte now relies make no reference to, and have no bearing on, the Garcia Defendants and thus cannot remedy the deficiencies in Ginarte's allegations against the Garcia Defendants. The decisions in *Schwartz* and *Fleischer*, on the other hand, make clear that allegations such as Ginarte's are wholly insufficient to state any cause of action against the Garcia Defendants.

B. Ginarte Fails To Allege Facts Sufficient To Support A Claim For Tortious Interference With Contract

As set forth in the initial Schwitzer Memorandum of Law ("Schwitzer Mem.," Dkt. No. 20), previously adopted and incorporated by reference by the Garcia Defendants, as a matter of law and public policy, Ginarte's clients have an absolute right to terminate their attorney-client relationship with Ginarte at any time and for any reason. Thus, to sustain a claim for tortious interference, Ginarte must allege conduct that amounted to a crime or an independent tort, which it has not done. (*Id.* at 7-8).

Ginarte claims in its opposition that it has done so. Yet nothing in either the Complaint or Ginarte's opposition alleges culpable conduct by the Garcia Defendants. Ginarte's allegation that the Garcia Defendants share office space with the Schwitzer Defendants simply is insufficient to establish that the Garcia Defendants engaged in unlawful or tortious conduct causing Ginarte's clients to substitute counsel, which is itself an inherent lawful act as a matter of settled law and public policy (*see* Doc. No. 20, at 7). For these reasons, as well as the arguments in the Schwitzer Defendants' Reply, which the Garcia Defendants adopt and incorporate by reference herein—Ginarte's First Cause of Action fails to state a claim for tortious interference with contract and should be dismissed.

C. There Is No Basis For Ginarte's Claim Under Judiciary Law § 487

As set forth in Defendants' moving papers, Ginarte's Second Cause of Action, for violation of N.Y. Judiciary Law § 487, fails for several reasons, including that Ginarte fails to allege (and cannot allege) that it was a party—rather than counsel—to any action in which any alleged deceit or conclusion occurred. (Dkt. No. 20, Schwitzer Mem. at 11).

Ginarte suggests that that the two relevant portions of the statue are separate standalone provisions such that "the party injured" may be any "person," and need not be a party to the case where the deceit or collusion occurred. This contradicts the plain language of the statute and the caselaw. The statute itself makes clear that the phrase "any party" in section 1 means "a party to a litigation," and the phrase "the party injured" in the remedies section of the statute means "the party to the litigation who was injured." N.Y. Judiciary Law § 487. Moreover, the First Department has held that a claim of deceit under Judiciary Law § 487 must have occurred "during a pending judicial proceeding in which plaintiff was a party." *See Bankers Tr. Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro*, 187 A.D.2d 384, 386 (1992). *Accord Beshara v. Little*, 215 A.D.2d 823, 823 (3d Dep't 1995) ("[i]t is well established that in order for a plaintiff to assert a

claim for treble damages pursuant to Judiciary Law § 487, an attorney's alleged deceit must have occurred during a pending judicial proceeding in which the plaintiff was a party").

Moreover, Ginarte fails to state a claim against the Garcia Defendants because it does not allege fraud with particularity as required by CPLR 3016(b). *Jean v. Chinitz*, 163 A.D.3d 497, 497 (1st Dep't 2018) (dismissing § 487 claim for failing to satisfy particularity requirement of CPLR 3016). Ginarte does not allege a single deceptive act committed by the Garcia Defendants, and nothing in its opposition papers cures that defect. For these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by reference herein, Ginarte's Second Cause of Action fails to state a claim for violation of New York Judiciary Law Section 487 and should be dismissed.

D. Ginarte Fails To Allege Any Of The Specific Facts Necessary To Support A Claim Of Defamation

As set forth in Defendants' moving papers, CPLR 3016(a) requires specification of the precise defamatory words uttered; further, defamatory statements that constitute non-actionable opinion or loose, figurative, or hyperbolic statements are non-actionable. (Dkt. No. 20, Schwitzer Mem. at 11-15). Again, although Ginarte attributes the alleged defamatory statements to "Defendants" (*see* Cplt. ¶ 35), it does not specifically aver that the Garcia Defendants made any of the alleged defamatory statements much less that they were made to a specific person, on a specific date, and at a specific place. Nothing in the Ginarte's opposition papers cures that defect. Thus, for these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by reference herein, Ginarte's Third Cause of Action fails to state a claim for defamation and should be dismissed.

E. Ginarte Fails To Allege Facts Sufficient To Support Its Claim Of Unfair Competition

As set forth in Defendants' moving papers, to state a claim for unfair competition, Ginarte must allege misappropriation of its (a) commercial advantage, (b) property, or (c) goodwill. (Dkt. No. 20, Schwitzer Mem. at 15-17). But notwithstanding Ginarte's conclusory allegations of a "coordinated scheme to use classic ambulance-chasing tactics and false statements," Ginarte fails to allege that the Garcia Defendants in particular made any false statements or undertook a single specific wrongful act. Nothing in Ginarte's opposition papers cures that defect. Ginarte alleges only that certain of its unidentified clients voluntarily elected to substitute the Garcia Defendants in place of Ginarte in pending actions. This does not constitute misappropriation of property or goodwill.

For these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by reference herein, Ginarte's Fourth Cause of Action fails to state a claim for unfair competition and should be dismissed.

F. Ginarte's Lack Of Relationship To Defendants Warrants Dismissal Of The Unjust Enrichment Claim

As set forth in Defendants' moving papers, to state a claim for unjust enrichment, Ginarte must plead either (a) that it undertook action for the Garcia Defendants' benefit, performed services at their behest, or otherwise conferred any benefit on them; or (b) that there was a sufficiently close relationship between Ginarte and the Garcia Defendants to support an unjust enrichment claim. (Dkt. No. 20, Schwitzer Mem. at 18).

Ginarte fails to allege any direct dealings between it and the Garcia Defendants at all, and nothing in its opposition papers cures this pleading defect. Thus, for these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by

reference herein, Ginarte's Fifth Cause of Action fails to state a claim for unjust enrichment and should be dismissed.

G. Ginarte Fails To Allege Any Specific Facts Supporting Its RICO Claim, Mandating Its Dismissal

As set forth in Defendants' moving papers, to state a claim for Civil RICO under 18 U.S.C. § 1962(c), Ginarte must allege (a) specific "predicate act" of mail or wire fraud under 18 U.S.C. § 1961; (b) particularized conduct by each Defendant showing its role in the participation and management of the alleged enterprise and establishing Defendants' intent to defraud; and (c) that the Garcia Defendants (or any Defendants) defrauded Ginarte in some way. (Dkt. No. 20, Schwitzer Mem. at 19-22).

Ginarte fails to identify any conduct by the Garcia Defendants that could constitute a "predicate act," or to allege that the Ginarte detrimentally relied upon any supposedly false representation by the Garcia Defendants, much less to allege that the Garcia Defendants managed an "enterprise" through a "pattern" of "racketeering activity. Its opposition papers fail to cure these fundamental defects.

For these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by reference herein, Ginarte's Sixth Cause of Action fails to state a RICO claim and should be dismissed.

H. There Is No Independent Cause Of Action For Conspiracy, So That Claim Must Be Dismissed

As set forth in Defendants' moving papers, "conspiracy" is not a cognizable, independent cause of action. (Dkt. No. 20, at 23-24). Indeed, Ginarte concedes this. (Dkt. No. 85, Opp. Mem. at 51). For these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by reference herein, the Seventh Cause of Action fails to state a claim and should be dismissed.

I. Ginarte Fails To Allege Any Viable Cause Of Action Or Any Damages That Cannot Be Remedied At Law, So Its Request For A Permanent Injunction Should Be Rejected

As set forth in Defendants' moving papers, Ginarte is not entitled to a permanent injunction because it fails to adequately allege: (a) any underlying cause of action; (b) a continuous or future injury; or (c) the lack of an adequate remedy at law. (Dkt. No. 20, Schwitzer Mem. at 24-27). Again, nothing in Ginarte's opposition papers establishes any of these elements as against the Garcia Defendants. For these reasons and as set forth more fully in the Schwitzer Reply, which the Garcia Defendants adopt and incorporate by reference herein, Ginarte's Eighth Cause of Action for a permanent injunction should be dismissed.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Schwitzer Reply, which are fully adopted and incorporated by reference herein, the Court should dismiss the Complaint against the Garcia Defendants.

Dated: New York, New York
April 12, 2019

Respectfully submitted,

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